86-34

No. 85-

Supreme Court, U.S.
FILED
JUL 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term 1985

DOUGLAS GANCI et al,

Petitioners,

-v.-

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DOUGLAS GANCI,
5316 Chestnut Avenue
Ashtabula, Ohio 44004

Petitioner, In Propria Persona
July 1986

QUESTIONS PRESENTED

1. Do the fundamental and reasonable doctrines of "Notice and Opportunity to be heard", "Due Process", and "Fair and Impartial hearing" - apply to a Tax Court proceeding ? The Sixth Circuit has answered in the negative, departing from established standards of review. The Fifth, Seventh and Eighth Circuits have answered in the affirmative.

2. Did the petitioners knowingly and intelligently waive their rights during the Audit and Tax Court proceedings ? The Sixth Circuit has answered in the affirmative. The Fifth, Seventh and Eighth Circuits have answered in the negative based upon similar facts as exist in this case.

LIST OF PARTIES

Petitioners include Douglas Ganci and his wife, Janet.

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IN THE

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OCTOBER TERM 1985

No. 85-____

DOUGLAS GANCI et al,

Petitioners,

-v.-

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, respectfully request that a writ of certiorari issue to review the opinion and judgement of the United States Court of Appeals for the Sixth Circuit entered on February 5, 1986.

OPINION BELOW

The opinion of the Court of Appeals and their order denying the Petition For Rehearing En Banc, are not officially reported. The opinion appears in the Appendix hereto at A-1-A-4. [1] The order denying the Petition For Rehearing appears at A-5.

The Tax Court dismissal order and *Memorandum Sur Order* appear at A-6-A-10.

1. Citations to the Appendix of this petition are in the above form.

JURISDICTION

The judgement of the United States Court of Appeals for the Sixth Circuit was entered on February 5, 1986 (A-1-A-4). Petitioners filed a timely Petition for Rehearing En Banc, which was denied April 15, 1986 (A-5). The jurisdiction of this Court is invoked under 28 U.S.C. 1254[1].

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the issuance of a Notice of Deficiency under section 6212 of the internal revenue code of 1954 as amended (26 U.S.C. 6212); Also the denial of the right to a written administrative appeal (publication 5, OMB No.1545-0530, Appeal Rights and Preparation of Protests for Unagreed Cases) prior to the issuance of the statutory deficiency notice; And the assessment by the Tax Court of a penalty under section 6673 of the internal revenue code of 1954 as amended (26 U.S.C. 6673).

The text of those statutes appear in the Appendix at A-11.

Also, involved is the operation of Tax Court rules pursuant to statutory limitation imposed by 28 U.S.C. Section 2072, providing in pertinent part:

> *"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."*

The Constitutional provisions involved are:

FIRST AMENDMENT - Right to Petition

> *"Congress shall make no law .... abridging .... the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."*

FIFTH AMENDMENT - Due Process Clause

> *".... nor shall any person... .... be deprived of life, liberty, or property, without due process of law; ...."*

STATEMENT OF THE CASE

A. Introduction

This court should review the decision of the Court of Appeals for three compelling reasons.

- *The Court of Appeals reached an illogical result* that is contrary to the record in this case. The record clearly shows that petitioners were denied an administrative appeal, that Tax Court abused discretion in denying petitioner's offer of proof, that no trial either administratively or judicially has been allowed, and that through mischief and error petitioners have been denied substantive rights.

- *The Court of Appeals has created a conflict in the circuits that also conflicts with prior decisions of this court:* In reaching its illogical conclusion, the panel expressly ignored the violation of Petitioner's Constitutional rights. The Tax Court failed to move forward on these issues, in contravention to the more reasonable and fair approach recognized by the Second, Eighth, and Ninth Circuits and this Court's doctrine in *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2nd 80 (1957), effectively sealing and closing the Courthouse door in the Tax deficiency proceeding; Thus subjecting the petitioners to the loss of protected substantive rights.

- *The Court of Appeals incorrectly decided an issue of fundamental importance in federal tax deficiency proceedings concerning due process of law:* The Appeals Court has set a precedent that is contrary to the fundamental doctrines of fair hearings upon which the foundations of this republic are based, creating a talismanic formula that effectively precludes appellate review for those individuals who in good faith, believe they would prevail on the merits of their case - but because of some procedural misunderstanding are to be denied the opportunity.

In sum, the panel in this case reached an unprecedented and illogical result on an issue of great practical significance, and in the process rejected the law of four other circuits. This court should review the conflict. Supreme Court Rule 17.1(a).

B. The Facts

The petitioners in approximately 15 years of filing income tax returns have never been formally audited. The year in question the petitioners had casualty losses and home office deductions which evidently targeted them for audit. They were corresponding with the district director about a convenient place and time and notified the District Director that they would be available in New York for any necessary meetings; The district director about a month later knowing petitioners were not at home, sent a 30 day appeal notice *by restricted delivery* addressed only to petitioners, which insured it would not be received. Shortly after this time, the Commissioner issued a 90 day Notice of Deficiency.

The petitioners, pro se, without aid of an accountant, or attorney, copied a form petition believing that it was for a small tax case; Then in good faith filed it *in forma pauperis*, in Tax Court to redress the Commissioner's deficiency notice.

Since Tax Court designated a place of trial, the petitioners fully expected a trial on the merits of their case and to prevail once the violations of procedural rights [2] was established and once all their receipts and proofs were entered into the record.

Petitioners were under the impression that every citizen has a fundamental right to have a day in Court, in an impartial atmosphere, and that all Courts are open. When the petitioners received the Tax Court order dismissing their cause of action without an opportunity

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2. Denial of appeal rights and denial of an audit at a convenient place and time, among other mischief.

to amend their petition - they were shocked. After reviewing the Tax Court memorandum, the petitioners in good faith filed a motion to modify or vacate the Court's order and made an offer of proof showing summarized and itemized receipts, proof of ownership and value, and other support for their position with respect to the disputed deductions.

This was believed to correct all the deficiencies claimed in the memorandum of Tax Court, (A-6-A-10). Petitioners fully expected Tax Court to vacate its order of dismissal and the penalty imposed pursuant to 26 U.S.C. 6673.

C. The Non-Trial

The petitioners never had a trial. [3]

D. The Court of Appeals Opinion

On appeal, the thrust of Petitioners arguments were:

- That they were denied a fair and impartial hearing from the administrative level through the Tax Court.

- That the lower Court should have determined on the record that petitioners knowingly and intelligently waived all their rights and opportunities to be heard. [4]

- That the record does not support the decision of the Tax Court.

- And that facts from the Tax Court petition could have been proven which would have entitled petitioners to relief.

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3. Neither an administrative trial (audit) at a place and time convenient to them, nor a judicial trial De Nova at the Tax Court.

4. As claimed by the Commissioner in his answering brief to the Court of Appeals.

The record in this case does not show beyond a doubt that petitioners would not prevail on any issue raised in the motion to vacate or in their original petition, as established by standard of review in *Conley v. Gibson* 355 U.S. 41, 45-46.

The facts of this case are distinguished from all the cases cited by the Court of Appeals in their opinion. In all the cases cited by the Sixth Circuit in affirming the Tax Court dismissal of petitioner's cause of action, the record in those cases clearly shows that a knowing and intelligent opportunity was given the parties to correct pleading deficiencies. For instance in *Scherping v. C.I.R.* 747 F. 2nd 478 (8th Cir. 1984), it was established that petitioner Scherping had been in Tax Court before and had been warned concerning the same deficiency previously by the Tax Court. The Eighth Circuit stating that it was the primary reason for affirming the dismissal by Tax Court in that case.

Clearly the common thread of Tax Court dismissal cases is that the parties were warned by the court and told to amend deficient petitions or face dismissal. Then after continued failure to correct them, Tax Court correctly dismissed.

This case is distinguished in that petitioners have never been before the Tax Court before. That Tax Court has never provided a knowing opportunity to amend as was done in many of the cases cited by the Court of Appeals and Commissioner.

Court of Appeals asserts that the Notice of Motion to dismiss for failure to state a claim, sent to petitioner was sufficient opportunity.

Clearly such an assertion is questionable at best. Since Tax Court knew they were dealing with layman proceeding *in forma pauperis* they should have determined on the record whether petitioners had any concept of what was required and whether they understood the complained of deficiency in their petition.

Without such a knowing and intelligent failure on the record by petitioners to support their petition, it was not reasonable to presume the petition was filed in bad faith or that they might not prevail on the merits.

Had the Court done so it would have learned, that petitioners believed they were in small tax court, [5] and the Motion to Dismiss was never served. [6] Petitioners even notified Tax Court of the failure of service by certified mail a few days after receiving Notice that Commissioner had filed a *Motion To Dismiss For Failure to State a Claim.*

Clearly, the record is void of the facts necessary to show a clear intent to file a frivolous cause of action, with the sole purpose of delaying the payment of taxes, *May v. C.I.R.*, 752 F.2nd 1301, 1307,1309 (8th Cir. 1985).

In *May*, supra, dismissal and penalties were proper because the record clearly showed May's intent was solely to delay the payment of tax for years that no tax returns were filed. In *May*, supra at 1308 the Eighth Circuit specifically stated it disapproved of the Tax Court's *sua sponte* awarding of damages pursuant to 26 U.S.C. 6673 - categorizing it as a disturbing trend emerging over the past two years.

This disturbing trend appears to have reached a new zenith with the decision here because the record clearly shows that petitioners had no actual knowledge that any claim advanced was frivolous or that the merit of their facts was not specific enough.

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5. In the Tax Court motion to modify or vacate the dismissal order, (Court of Appeals, Appellant's Appendix page G4[VIII]) - petitioners stated -"VIII. Judicial Notice is hereby given that since Tax Court Rules provide no appeal to an Article III judge (for Small Tax Cases), that Petitioners are at least entitled to a evidentiary hearing; otherwise this Court [Tax Court] would deprive Petitioners of their basic rights to due process in the Constitutional sense."

6. In the Court of Appeals, Appellant's Reply Brief - Exhibit pages A1-A3, show a notarized Affidavit dated February 10, 1984, sent Certified mail P442242815 to Tax Court, return receipt requested (page. A3). Item 6 therein states "...-but am confused as to the first mentioned Motion (to dismiss) since it was not enclosed." Also attached thereto (page A2) is a copy of the Notice of Filing served by the Tax Court dated January 31, 1984.

Still the allegation of Constitutional rights violations should have caused Tax Court to investigate and proceed further because the burden to move forward on the allegations fell upon the Tax Court, *Rahjeja v. C.I.R.*, 752 F.2nd 64, 66-67.

Then, clearly, the standard for dismissal was not met as laid down by this Court in *Conley v. Gibson*, supra.

In this case the Tax Court and Commissioner claimed that to afford petitioners a hearing, would only encourage others to flood the Courts with frivolous petitions, apparently adopting the discredited doctrine that it is less expensive to deny petitioner's rights than to afford them. This Court found it plainly wrong to deny rights simply because of hostility to their assertion and exercise. [7]

REASONS FOR GRANTING THE WRIT

The basic issue raised by this case involves the fundamental concepts of due process of law which govern this republic. This question is perhaps the most important due process issue of the decade.

The urgency of the issue has grown since the Senate through Pennsylvania's U.S. Senator Heinz, launched an investigation into the operations of the Internal Revenue Service. The Senate has passed a sweeping landmark Tax Reform package. A lengthy restatement of the importance and unsettled nature of the issue seems unnecessary and an imposition on the Court. There is no indication that this issue will be resolved in the foreseeable future in the absence of a decision by this Court. The nation deserves an answer to this fundamental question. There are no such impediments, procedural or Constitutional, to review in this case. There is no chance of mootness. Nor is there any lack of finality.

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7. Watson v. Memphis, 375 U.S. 526

Prior to Congress amending Section 6673 of the Internal Revenue Code of 1954 (26 U.S.C. 6673) increasing the damage award from 500.00 dollars to 5,000.00 dollars, the custom of Tax Court and practice of Tax Court was to give *Pro Se* litigants an opportunity to amend their petitions in order to perfect any pleading deficiencies.

If the *Pro Se* litigants failed to avail themselves of this opportunity to amend their pleadings, the Tax Court then was justified in dismissing the petitioner's cause of action. This custom and practice of Tax Court established the facts on the record that the litigants knowingly, intentionally and voluntarily failed to prosecute their claim.

On the other hand if the litigants choose to amend their petition and their amended petition was meritorious, the matter then would be referred back to the Internal Revenue Service, Appellate Section to see if the controversy could be settled administratively. This practice provided an excellent record for appellate review.

Since Congress has increased the penalty of Section 6673 of the Internal Revenue Code from $500.00 to $5000.00, the practice in the Tax Court is increasingly not to give *Pro Se* litigants an opportunity to amend their pleading, but to dismiss the *Pro Se* litigants petition, *sua sponte* in some cases and to *sua sponte* award large damages without first establishing on the record that the *Pro Se* litigant intentionally filed his petition for the purposes of delaying the payment of the taxes allegedly due.

The Tax Court's current custom and practice has become a talismanic formula that effectively precludes review in *Pro Se* litigant cases.

The doors of our courts must always remain open to persons seeking in good faith to invoke the protection of the law and our Courts must be ever vigilant to protect the integrity of the judicial process.

CONCLUSION

The decision below represents a grave departure from this Court's doctrine on *Pro Se* litigants as spelled out in *Haines v. Kerner*, 404 U.S. 519 (1972) and this Court's doctrine in *Conley v. Gibson*, 355 U.S. 41, on dismissals. The failure of the Tax Court to follow its older custom and practice of permitting *Pro Se* litigants to amend deficient petitions has risen to a level of due process violation as this Court has stated in *Morton v. Ruiz*, 415 U.S. 199 (1974). This Court should resolve the Sixth Circuits conflict with this Court and the other Circuits, (inter alia, *May v. C.I.R.* supra; *Crandall v. C.I.R.* 650 F 2nd 659 (5th Cir. 1981); et seq.)

Respectfully Submitted,

DOUGLAS GANCI
5316 Chestnut Avenue
Ashtabula, Ohio 44004

APPENDIX

No. 85-1005

United States Court of Appeals

For The Sixth Circuit

DOUGLAS GANCI et al,

Appellants,

-v.-

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

ORDER

Decided February 5, 1986 Without Argument
Rehearing Denied April 15, 1986

Before:

MARTIN and KRUPANSKY, *Circuit Judges*,
and CHURCHILL, *District Judge.**

This appeal has been referred to a panel of the Court pursuant to Rule 9(a), Rules of the Sixth Circuit. After examination of the record and the briefs filed by the respective parties, this panel agrees unanimously that oral argument is not needed. Rule 34(a), Federal Rules of Appellate Procedure.

* Of the Eastern District of Michigan, sitting by designation.

Douglas ans Janet Ganci bring this appeal from the summary judgment dismissing their action challenging a tax deficiency assessment in the Tax Court. The appellants were assessed a tax deficiency in the amount of $3,250 for 1980. One hundred seventy eight dollars was added to this deficiency pursuant to 26 U.S.C. 6653[a]. The district court granted the Commissioner's motion to dismiss on the basis that the appellants' petition did not set forth sufficient facts to warrant relief. On appeal, the appellants contend that they did not have sufficient notice or opportunity to be heard on the Commissioner's motion to dismiss.

In deficiency actions, the Commissioner's determination is presumed correct and the petitioner bears the burden to prove otherwise. *Welch v. Helvering*, 290 U.S. 111 (1933). While it is true that *pro se* pleadings should be liberally construed, *Haines v. Kerner*, 404 U.S. 519 (1972), broad conclusory allegations cannot carry the burden imposed upon the petitioner. *Scherping v. C.I.R.*, 747 F.2d 478 (8th Cir. 1984). The Tax Court pleadings require more detail than necessary under the Federal Rules of Civil Procedure. See 26 U.S.C. 7453, *Scherping, Id.*

In reviewing the appellant's petition, it is apparent the Tax Court correctly dismissed the action. The petition contains broad statements which do not clearly set forth the issues. In addition, various tax protestor arguments are set forth as justification for failing to pay the tax. Wages are clearly taxable. *Perkins v. C.I.R.*, 746 F.2d 1187 (6th Cir. 1984). With respect to alleged errors in the deficiency notice, the appellants simply set forth the following list:

1. Adjusted gross income of $30,651.77
2. Adjustments to deductions (all)
3. Willful oppression pursuant to 26 U.S.C. 7214
4. Jurisdiction
5. Fraudulent contract
6. Administrative

The conclusory allegations set forth by the appellants are not sufficient to state a claim for relief. Tax Rule 34, 26 U.S.C. foll. 7453. See *Scherping v. C.I.R.*, supra.

The appellants' contention that they did not have sufficient opportunity to respond to the motion to dismiss is without merit. In the reply brief, by affidavit, the appellants claimed they never received the motion to dismiss. The evidence in the record refutes their allegation. The motion to dismiss was filed on January 31, 1985, and a notice of filing was served upon the appellants February 6, 1984. This document notified the appellants that a motion to dismiss, along with a motion for extension of time, had been filed by the Commissioner. In response, the appellants filed a motion to dismiss the notice of deficiency and a motion to deny the time extension. In addition, an examination of the appellants' motion to deny an extension of time reveals that they evidently received the motion to dismiss. For example, in 2.10 of their motion to deny extension, the appellants specifically mention the motion to dismiss, and in 2.11, the appellants state they will submit briefs contra to the respondent's motions. Furthermore, the appeallants do not mention failure to recieve the motion in their subsequent motion to vacate. In that pleading, they simply conmtended that a hearing should have been held. It was incumbent upon appellant to raise objections concerning the failure of service in the Tax Court. Accordingly, it was proper for the Tax Court to dismiss the action in accordance with Rule 121, 26 U.S.C. foll. 7453.

The appellants' final argument is that, because they submitted documentary evidence with their motion to vacate, the Tax Court abused its discretion in denying the motion to vacate. The documentary evidence concerned deductions disallowed by the Commissioner. A post decision ruling of the Tax Court will not be overturned upon appeal absent a clear abuse a discretion. See *Parkinson v. C.I.R.*, 647 F.2d 875 (9th Cir.1981). In the interest of efficient performance of judicial work, a second trial is not ordinarily granted to consider a new theory which could have been considered at trial. *Robin Haft Trust*, 62 T.C. 145 (1974), rev'd on other grounds, 510 F.2nd 43, 45 n.1 (1st Cir. 1975). The appellants' argument in this respect is without merit. They had sufficient opportunity to submit this evidence to the Tax Court after the motion to dismiss was filed.

Additionally, the documentation presented by the Internal Revenue Service in its reply to the motion to vacate shows the Commissioner made a good faith attempt to allow explanation of appellants' contested deductions prior to the litigation. As the evidence submitted by the Commissioner shows, this attempt was met with evasiveness on the part of the appellants. In view of the fair opportunity afforded the appellants to present their evidence during litigation and their obvious evasiveness in dealing with the Commissioner prior to litigation, the Tax Court did not abuse its discretion in denying the motion to vacate.

Accordingly, it is ORDERED the decision of the Tax Court is affirmed pursuant to Rule 9(d)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

John P. Hehman - Clerk

No. 85-1005

United States Court of Appeals

For The Sixth Circuit

DOUGLAS GANCI et al,

Appellants,

-v.-

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

O R D E R

B e f o r e :

MARTIN and KRUPANSKY, *Circuit Judges*,
and CHURCHILL, *District Judge.**

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has reviewed the petition for rehearing and concludes that the issues in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Entered By Order Of The Court
John P. Hehman - Clerk

* Of the Eastern District of Michigan, sitting by designation.

No. *34071-83*

United States Tax Court

Washington, D.C. 20217

DOUGLAS GANCI et al,

Petitioners,

-v.-

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER OF DISMISSAL AND DECISION

Decided June 28, 1984 - Without Trial
Motion to Vacate Denied - September 25, 1984

LEE M. GALLOWAY - *Special trial Judge.*

On January 31, 1984, respondent filed a *Motion To Extend Time Within Which To Move With Respect To The Petition* and a *Motion To Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted.* On February 13, 1984, petitioners filed an objection to Respondent's motions entitled *Petitioners' Motion To Deny Respondent's Motion To Extend Time With Respect To The Petition* and *Petitioners' Motion To Dismiss Respondent's Notice Of Deficiency.* Respondent's and Petitioners' motions were assigned to Special Trial Judge Lee M. Galloway for consideration. After a review of this record and for the reasons appearing in the **Memorandum Sur Order** attached, it is

ORDERED that Petitioners' *Motion To Dismiss Respondent's Notice Of Deficiency* which was filed on February 13, 1984, is denied, and it is further

ORDERED that Respondent's *Motion To Extend Time Within Which To Move With Respect To The Petition* and Respondent's *Motion To Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted*, both of which were filed January 31, 1984, are hereby granted. It is further

ORDERED and DECIDED:

1. That there is a deficiency in income tax due from petitioners in the amount of $3,560 for the taxable year 1980, and an addition to tax under section 6653(a)(1) in the amount of $178 for the same year; and

2. That damages are due from petitioners which are hereby awarded to the United States in the amount of $3,500 pursuant to section 6673, Internal Revenue Code of 1954, as amended.

MEMORANDUM SUR ORDER

This case was assigned to Special Trial Judge Lee M. Galloway pursuant to the provisions of section 7456(c) and (d) [1] and Delegation Order No. 8, 81 T.C. XXV (1983), for disposition of respondent's *Motion To Extend Time Within Which To Move With Respect To The Petition* and respondent's *Motion To Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted*, both of which were filed January 31, 1984, pursuant to Rules 36(a) and 40 [2]. Petitioners' objection was timely filed on February 13, 1984. On the same day petitioner filed a *Motion To Dismiss Respondent's Notice Of Deficiency.*

1. All section references are to the Internal Revenue Code of 1954, as amended, unless otherwise indicated.

2. Unless otherwise indicated, any reference to "Rules" shall be deemed to refer to the Tax Court Rules of Practice and Procedure.

We first consider petitioners' *Motion To Dismiss Respondent's Notice Of Deficiency*, which we deny. Respondent has proceeded properly under the rules of this Court. See Rules 36(a), 54. There is no basis for petitioners' statement that "there is no issue of fact in dispute" in this proceeding.

Respondent's notice of deficiency, which was mailed to petitioners on September 7, 1983, at there last known address of 5316 Chestnut Avenue, Ashtabula, Ohio 44004, disclosed a deficiency in income tax for the year 1980 in the sum of $3,560 and an addition to tax under section 6653(a)(1) in the amount of $178. The notice of deficiency was based on the following adjustments: (1) failure by petitioners to establish that they sustained a casualty loss claimed in the amount of $4,032, (2) failure by petitioners to substantiate employee business expenses claimed in the amount of $5,927.94, (3) failure by petitioners to report interest income in the amount of $2,213, (4) failure by petitioners to substantiate miscellaneous deductions claimed in the amount of $1,526.16, and (5) respondent's assertion of the section 6653(a)(1) addition to tax in the amount of $178.

Rule 34(b) provides in part that the petition in a deficiency action shall contain "(4) [c]lear and concise assignments of each and every error which petitioner alleges to have been committed by the Commissioner in the determination of the deficiency or liability, and "(5) [c]lear and concise lettered statements of the facts on which petitioner bases the assignments of error."

Petitioners' assignments of error contained in the petition filed are as follows:

(1) adjusted gross income of 30,651.77
(2) adjustments to deductions (all)
(3) willfull [sic] oppression pursuant to 26 U.S.C. 7214
(4) jurisdiction
(5) fraudulant [sic] contract
(6) administrative

Petitioners' 3-page protester-type statement of alleged facts supporting respondent's alleged errors is frivolous, nonsensical and warrants little discussion. None of the issues raised in respondent's notice of deficiency are addressed.

Petitioners vaguely claim that wages are not taxable even though wages received by petitioner Douglas Ganci from Lambda Technology, Inc., in the amount of $28,312.44 were correctly reported on petitioners' tax return [3]. Petitioners also allege that they are entitleed to a jury trial [4].

The petition raises no justiciable error with respect to either respondent's determination of income tax or addition to tax under section 6653(a)(1) for the year 1980, nor does petitioners' argument set forth any supporting facts. Under such circumstances, Rule 34(b) provides that any issue not raised in the assignment of errors shall be deemed conceded. Rule 34(b)(4); *Jarvis v. C.I.R.*, 78 T.C. 646, 658 (1982). *Gordon v. C.I.R.*, 73 T.C. 736, 739 (1980). Since petitioner's claim is frivolous and without merit, we grant respondent's motion to dismiss for failure to a claim upon which relief can be granted. See *Fusero v. C.I.R.*, T.C. Memo. 1983-784; *White v. C.I.R.*, T.C. Memo. 1981-609; *Baker v. C.I.R.*, T.C. Memo. 1981-400.

Finally, we must decide whether to award the United States on our motion, damages under the provisions of section 6673, as applicable to actions in this Court commenced after December 31, 1982. This section provides an award for damages to the United States in an amount not in excess of $5000 [5] when it appears to us that the proceedings maintained by the taxpayer's before this Court are primarily for delay or that the taxpayer's position in this proceeding is frivolous or groundless.

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3. Petitioners now claim that tax liability of $2,249 reported on their tax return should be refunded.

4. We deny petitioners' frivolous claim for a jury trial. It is well settled that in a suit concerning Federal tax liability, no right to a jury trial exists under the Seventh Amendment guaranteeing a jury trial on common law actions. Cupp v. C.I.R., 65 T.C. 68 (1975), affd. without published opinion 559 F.2d 1207 (3rd Cir. 1977).

5. Prior to the effective date of this attachment, the maximum amount that this Court could award as damages under section 6673 was $500.

We awarded damages for the first time on our own motion in the circumstances existing in *Sydnes v. C.I.R.*, 74 T.C. 864, 870-873 (1980), affd. 647 F.2d 813 (8th Cir. 1981). In this case, petitioners commenced this action by filing a groundless tax protester's form petition. When responding to respondent's motion to dismiss petitioner filed a frivolous written opposition. We believe that petitioners were well aware of their legal responsibility to report wages as gross income in the year 1980 and to substantiate deductions claimed when requested. In fact, petitioners initially reported income from wages which they now contend was reported in error. Accordingly, since petitioner's grounds for commencing their action in this Court were frivolous and the sole purpose of unduly delaying the reporting of their full 1980 income tax liability, we award the United States damages in the amount of $3500 pursuant to section 6673.

LEE M. GALLOWAY
Special Trial Judge

STATUTES INVOLVED

26 U.S.C. 6212. - Notice of Deficiency

(a) In General.

If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 41, 42, 43, 44, 45, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

26 U.S.C. 6673. - Damages assessable for instituting proceedings before the Tax Court primarily for delay, etc.

Whenever it appears to the Tax Court that proceedings before it have been instituted or maintained by the taxpayer primarily for delay or that the taxpayer's position in such proceedings is frivolous or groundless, damages in an amount not in excess of $5,000 shall be awarded to the United States by the Tax Court in its decision. Damages so awarded shall be assessed at the same time as the deficiency and shall be paid upon notice and demand from the secretary and shall be collected as a part of the tax.